

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Victor Adrian Shortey,

10 Petitioner,

11 v.

12 United States of America,

13 Respondent.
14

No. CV-24-00435-PHX-DLR

No. CR-22-00167-PHX-DLR

ORDER

15
16 Before the Court is the Report and Recommendation (“R&R”) of Magistrate Judge
17 James F. Metcalf (Doc. 21) regarding Movant Victor Adrian Shortey’s motion to vacate,
18 set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (Doc. 1). The R&R
19 recommends that the Motion be denied and that a Certificate of Appealability be denied.
20 (Doc. 21 at 10.) The R&R advised the parties that they had fourteen days from the date of
21 service of a copy of the R&R to file specific written objections with the Court. (*Id.* at 10–
22 11.) Movant filed a letter to the Court (Doc. 22), which the Court treats as an objection to
23 the R&R. Respondent timely filed its response. (Doc. 24.)

24 Movant objects to the R&R’s findings regarding his claims of ineffective assistance
25 of counsel. (Doc. 22 at 1.) The standards for raising an ineffective assistance of counsel
26 claim are set out in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), where the Court
27 stated:

28 A convicted defendant’s claim that counsel’s assistance was so
defective as to require reversal of a conviction . . . has two

1 components. First, the defendant must show that counsel's
2 performance was deficient. This requires showing that counsel
3 made errors so serious that counsel was not functioning as the
4 "counsel" guaranteed the defendant by the Sixth Amendment.
5 Second, the defendant must show that the deficient
6 performance prejudiced the defense. This requires showing
7 that counsel's errors were so serious as to deprive the defendant
8 of a fair trial, a trial whose result is reliable. Unless a defendant
9 makes both showings, it cannot be said that the conviction . . .
10 resulted from a breakdown in the adversary process that
11 renders the result unreliable.

12 The Court explained how to prove prejudice: "The defendant must show that there
13 is a reasonable probability that, but for counsel's unprofessional errors, the result of the
14 proceeding would have been different. A reasonable probability is a probability sufficient
15 to undermine confidence in the outcome." *Id.* at 694.

16 Movant's first objection to the R&R's recommendation concerning his ineffective
17 assistance of counsel claims is based on a dispute he has with the affidavit of defense
18 attorney Tate. Tate submitted an affidavit setting forth the dates when he met with Movant.
19 Movant disputes those dates and the number of meetings that occurred. (Doc. 22 at 1–2.)
20 However, Movant has not shown (1) what dates he claims his meetings with Tate took
21 place, (2) what did or did not happen in the meetings that was deficient, and (3) how
22 anything that could or should have happened in those meetings would have probably
23 changed the outcome of the case. Movant's objection fails to meet the *Strickland* standards
24 for proving ineffective assistance of counsel.

25 Movant next objects to the R&R's findings regarding his claim of ineffective
26 assistance of counsel for Tate's failure to object when the prosecutor spoke at sentencing.
27 (*Id.* at 2.) His objection does not point to anything objectionable that the prosecutor said.
28 He also faults his counsel for not objecting to a statement in the Presentence Report
("PSR") which he claims undermined his credibility. (*Id.*) Movant fails to show how the
failure to object to the portion of the PSR which he found offensive—whether he attended
electrical tech school—was deficient performance or how objecting would have changed
the outcome of the case. Movant has not shown that Tate's failure to object to the PSR
meets the *Strickland* standards for proving ineffective assistance of counsel.

1 Lastly, Movant objects to the R&R's findings regarding his claim of ineffective
2 assistance of counsel for Tate's failure show him a video due to Wi-Fi connectivity issues.
3 (*Id.*) Movant fails to show his viewing of the subject video would have changed the
4 outcome of the case. Movant has thus not met the *Strickland* standard on his final objection.

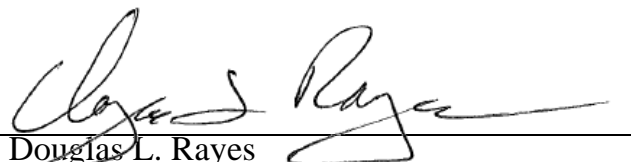
5 The remainder of discussion in Movant's motion are not objections but information
6 on his progress while in custody and health issues. While Movant is making important
7 strides in self-improvement while in custody, that information is not something that the
8 Court can use to vacate, set aside or correct the sentence.

9 **IT IS ORDERED** as follows:

- 10 1. Movant's objections to the R&R (Doc. 22) are **OVERRULED**;
- 11 2. The R&R (Doc. 21) is **ACCEPTED**;
- 12 3. Movant's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. §
13 2255 (Doc. 1) is **DISMISSED** with prejudice;
- 14 4. A Certificate of Appealability and leave to proceed in forma pauperis on appeal are
15 **DENIED** because jurists of reason would not find the district court's assessment of
16 the claims debatable or wrong.

17 The Clerk of the Court shall enter judgment accordingly and terminate this case.

18 Dated this 5th day of March, 2025.

19
20
21 
22 Douglas L. Rayes
23 Senior United States District Judge
24
25
26
27
28